

FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox, and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 Regulations: Adoption of Proposed Regulation 18531.7

Date: July 26, 2002

I. INTRODUCTION

Payments for communications supporting or opposing a candidate or ballot measure typically are reportable "contributions" or "expenditures" under the Political Reform Act (the "Act").¹ (§§ 82015 and 82025.)² Section 85312, enacted by Proposition 34 and later amended by Senate Bill 34, provides an exception to this general rule for "member communications."³ If an entity raises or expends \$1,000 or more with respect to a candidate or ballot measure, then that entity becomes a "committee." Once it is established, the committee must comply with the Act's rules regarding disclosure of contributions and expenditures and make periodic public filings. In addition, contributions the committee may make to a candidate are subject to limitation. Thus, section 85312, by carving out an exception for payments that otherwise would be considered a "contribution" or "expenditure," operates to prevent certain entities from becoming subject to the Act's rules described above.

As amended, § 85312 provides:

For purposes of this title, payments for communications to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards,

¹ All references are to the Government Code.

² Sections 82015 and 82025 provide the definitions for contribution and expenditure, respectively. These sections are further interpreted by regulations 18215(a)(1) and 18225(a)(1).

³ "Member communications" refers to communications to members, employees, and shareholders of an organization or families of those persons and is the colloquial name given to the provisions of section 85312.

and newspaper advertisements. However, payments made by a political party for communications to its members who are registered with that party which would otherwise qualify as contributions or expenditures shall be reported in accordance with Article 2 (commencing with Section 84200) of Chapter 4, and Chapter 4.6 (commencing with Section 84600), of this title.

Proposition 34 focuses on many complex issues in a complex manner and the membership communications statute is no exception. While seemingly straightforward at first glance, section 85312 requires answering complicated questions surrounding the scope and purpose of the statute, as well as the troublesome task of defining otherwise innocuous terms. As the Commission is well aware from its consideration of these issues over the past year and a half, an informed and useful regulation requires the Commission to make threshold policy determinations concerning many facets of the statute's implementation. The Commission most recently considered a proposed regulation, regulation 18531.7, at its March 2002 meeting. While the Commission made several critical interpretations at the March meeting, which built on the foundation of determinations made in the prior year, the Commission asked staff to reexamine the draft regulation in light of lingering questions regarding the scope and implementation of the statute.

Pursuant to the Commission's request, staff has redrafted proposed regulation 18531.7, attached as Exhibit 1. This memorandum and the revised regulation do not ask the Commission to revisit each threshold decision made in the past. Rather, staff endeavored to redraft the regulation in a manner that preserves core decisions already made by the Commission while providing new options for key issues that await resolution. In this memorandum, staff revisits the issue of the purposes of the statute, the Act's general purposes, as well as the constitutional implications surrounding the concepts embodied in section 85312. It is staff's goal that the draft regulation may be improved by a simplification of many of the concepts addressed in the regulation, helping to solve the remaining issues facing the Commission so that the regulation will be in place for the 2002 general election.

II. PRINCIPLES AND LAW GUIDING INTERPRETATION OF SECTION 85312

Over the history of the Commission's consideration of section 85312, the Commission has made several key determinations about the statute. For instance, the Commission has cautioned that while it is obligated to give meaning to the words of the statute, the Commission will be careful to avoid interpretations that create loopholes in the Act's contribution limits and reporting provisions. The Commission favors a regulation which focuses on a regulatory definition of "organization" and "member." The Commission also determined that political committees are included in a broad definition of "organization," meaning committee communications to its members are subject to the exception embodied in the statute. Other issues remain, however, such as whether payments may be "behested" by a candidate or paid for by a third party, whether the term "member" should be defined narrowly or broadly, and who are the "members" of a

committee. While the Commission certainly is familiar with many of the concepts guiding statutory interpretation, for the sake of thoroughness, staff presents a brief overview of those principles in addition to a discussion of the background of the statute itself.

A. SCOPE OF SECTION 85312: STATUTORY CONSTRUCTION

The proper approach to construing a statute is succinctly outlined by *Estate of Griswold*, 25 Cal.4th 904, 911 (2001), as follows:

"We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citations omitted.] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.] If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation omitted.] In such cases, we select the construction that comports most closely with the apparent intent of the Legislature, with a view of promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences."

"In interpreting the Act, the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." (*Watson v. Fair Political Practices Commission* (1990) 217 Cal.App.3d 1059, 1076, upholding Regulation 18901.)

Section 85312 provides, in part:

"For purposes of this title, payments for communications to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements. ..."

This sentence does not identify the persons who make the payments described in this section. Nor does the sentence define the terms "organization" and "members," nor any other terms. To address this issue, Commission staff has developed regulatory language to define the persons to which the provisions of section 85312 apply. Commission regulations are deemed valid so long as they are "consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (*Consumers Union of U.S. Inc. v. California Milk Producers Advisory Board* (1978) 82 Cal.App.3d 433, 447.) To interpret these terms, it is proper to look to extrinsic sources to determine the scope of Section 85312. (*Estate of Griswold, supra*, 25 Cal.4th

904, 911; *Watson v. Fair Political Practices Commission*, *supra*, 217 Cal.App.3d 1059, 1076.) Extrinsic evidence includes voter pamphlet materials, legislative analysis and arguments of support for Senate Bill 34, and the express statutory purposes of the Act.

1. Proposition 34: Voter Intent

As passed by the voters in Proposition 34, section 85312 initially provided that payments for communications to "members, employees, shareholders, or families of members, employees, or shareholders" ("MESF") of an organization, for the purpose of supporting or opposing a candidate or a ballot measure, were not contributions or *independent* expenditures, provided those payments were not made for general public advertising.

When seeking to ascertain the voters' intent, the voter information pamphlet is an obvious source of information. The voter pamphlet does not prove to be very illuminating in identifying the intent for section 85312, however. The Official Voter Information Guide for the November 2000 election (containing the official summary of Proposition 34, as well as the ballot arguments for and against the measure), stated that the measure "expands public disclosure requirements," but did not specifically address provisions of section 85312. Therefore, the voter pamphlet is a source of guidance in determining the voter intent with regard to the purpose of section 85312 only insofar as that purpose is related to the goal of expanding disclosure.

2. Purposes of the Act

To identify the purposes of section 85312, the Commission may also turn to the "ostensible objects to be achieved" by the Act. (*Estate of Griswold*, *supra*.) Section 81002 identifies the following relevant purposes for which the Act was enacted:

- "Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.
- The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials.
- Adequate enforcement mechanisms should be provided to public officials and private citizens in order that this title will be vigorously enforced." (§ 81002(a), (b), and (f).)

The goal of the commission and staff in interpreting section 85312 is to construe the statute in a manner that is both consistent with its language *and* with the purposes of the Act. Any such construction would presumably be the correct one. (*Great Lakes Properties, Inc. v. City of El Segundo*, (1977) 19 Cal.3d 152, 155.)

B. PURPOSE OF THE MEMBERSHIP COMMUNICATIONS EXCEPTION

As shown above, the specific purposes of section 85312 were not clearly set forth in the voter pamphlet materials that discussed Proposition 34. Thus, one must engage in

a certain amount of conjecture about the inspiration for such an exception to the contribution and expenditure limits. Since, as shown above, payments characterized as expenditures or contributions would be subject to limitation by other provisions in the Act, it appears section 85312 was meant to carve out certain payments that should not be subject to limitation. The implication behind such an exception is that the types of payments covered by section 85312 must be, necessarily, different in some important regard from traditional payments by other persons in different contexts. At least one observer has provided the following rationale for such a distinction:

"The people of the State, acting through the ballot measure process, have determined that these communications, which implicate the freedom of individuals to associate for common purposes (including political purposes) do not share the essential attributes of contributions and it is therefore not appropriate to regulate them in the same manner as contributions. This policy reflects the State's construction of basic constitutional concepts in this area, and the need to minimize governmental intrusion into the internal affairs of membership-based organizations." (Request for Commission Opinion, by Lance Olson, Esq., 5/15/01.)

The connection just described - between section 85312 and constitutional protections regarding speech and association - is the most plausible explanation for the statute given the context of its limitations. While scope issues remain, the primary conditions of the statute require that the communication be one between an organization and its membership - not to the general public. This connotes an intention to treat speech among members of certain groups carefully so that constitutional protections are not offended. The bounds of those freedoms, and thereby the scope of the protections expressed in section 85312, are not without limitation, however. The discussion below describes the parameters of the First Amendment's freedom of association.

III. THE FIRST AMENDMENT FREEDOM OF ASSOCIATION

According to renowned constitutional law expert Laurence H. Tribe, the right of association as we know it today is a fairly recently recognized right. (*American Constitutional Law*, 2d. Ed., 1988, L.Tribe, Ch.12-26.) Originally founded under the right of privacy, the right of association has gained more equal footing with its express First Amendment counterparts. The seminal modern case on point is *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). According to Tribe, not until *Citizens* did individuals acting in concern have an associational right to be as free to pursue lawful aims as they would if the same individuals pursued the same aims acting separately. (Tribe, *supra*, at p. 1012.)

In *Citizens*, the city imposed a limit of \$250 on individual contributions to committees formed to support or oppose referendum decisions; no such limitation on expenditures of an individual acting alone was imposed. (*Citizens*, 454 U.S. at p. 296.)

Stating that such a limit could not validly have been imposed on solitary expenditures, the Court held this situation unconstitutional:

"There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them. To place a Spartan limit - or indeed any limit - on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association. [The Berkeley ordinance] does not seek to mute the voice of one individual, and it cannot be allowed to hobble the collective expressions of a group." (*Id.*, at p. 297.)

Tribe notes that in this case the Court for the first time "recognized constitutional protection of associational conduct not solely on the ground that the conduct was independently protected as speech or religion, but rather on the ground ... that the state had not sought to limit the conduct *except* when engaged in by persons banding together." (Tribe, *supra*, at p. 1013.) It also is observed that the freedom to associate includes the right *not* to join with others in their pursuit of First Amendment objectives. Citing Tribe, the United States Supreme Court in *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981), struck down a state law that would have compelled the Democratic Party, at its National Convention, to seat delegates chosen at a state primary that was open to non-Democrats, stressing that "freedom of association would prove an empty guarantee if associations could not limit control over their decision to those who share the interests and persuasions that underlie the association's being." (*Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 122 n.22 (1981).)

After *Citizens*, Tribe defines an abridgement of the freedom of association as "... any insufficiently justified governmental rule, practice, or policy that interferes with or discourages a group's pursuit of ends having special first amendment significance, such as literary expression, or political change, or religious worship." (Tribe, at p. 1015.) Abridgment of this right is commonly found in the following scenarios:

"(1) directly punishing the fact of membership in a group or association or the fact of attendance at a meeting of such a group or association; (2) intruding upon the internal organization, or integral activities, of an association or group, including its decision of whom to include as members and its decisions as to which non-members to invite to take part in its processes; (3) withholding a privilege or benefit from the members of a group or association; and (4) compelling disclosure of a group's membership or of an individual's associational affiliations, either through a focused investigation or as part of a general disclosure rule, in circumstances where anonymity is likely to prove important to the continued viability of various associational ties." (Tribe, *supra*, at p. 1015.)

This concept most recently has been affirmed by the United States Supreme Court in *Boy Scouts of America v. Dale*, in which the Court ruled that the scouting organization could not be required under a public accommodations law to admit a gay Eagle Scout. (*Boy Scouts of America v. Dale* (2000) 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554.) In the case, the organization claimed that part of the purpose of the scouts was to instill the message in the boys that a scout must pursue a "morally straight" path in life. (*Id.*, at p. 651.) The organization maintained that homosexuality was inconsistent with that core message and therefore the organization was entitled to determine for itself who could attain and hold positions of leadership and membership within the organization. (*Id.*) Though the plaintiff Eagle Scout and others disputed whether an anti-homosexual message was part of the group's core belief system, the Court found that the Boy Scouts was in part an association whose core values and message included a rejection of homosexuality. (*Id.*, at pp. 652-653, 671-678.) Because an association is entitled to determine for itself, under the constitutional analysis described above, who may or may not compose its membership consistent with its core values and/or message, the Boy Scouts was entitled to exclude the homosexual Eagle Scout. (*Id.*, at pp. 656, 661.)

This is not to say, however, that the freedom of association is without limit. As Justice Brennan stated for the Court in *Roberts v. United States Jaycees*:

"The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." (*Roberts v. United States Jaycees*, (1984) 468 U.S. 609, 623, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462, 475.)

The Jaycees was a nonprofit membership organization "designed to inculcate in the individual membership . . . a spirit of genuine Americanism and civic interest, and . . . to provide . . . an avenue for intelligent participation by young men in the affairs of their community." (*Id.*, at pp. 612-613.) The organization was divided into local chapters, described as "young men's organizations," in which regular membership was restricted to males between the ages of 18 and 35. (*Id.*, at p. 613.) But Minnesota's Human Rights Act, which applied to the Jaycees, made it unlawful to "deny any person the full and equal enjoyment of . . . a place of public accommodation because of . . . sex." (*Id.*, at p. 615.) The Jaycees, however, claimed that applying the law to it violated its right to associate -- in particular its right to maintain its selective membership policy.

The Supreme Court rejected that claim, cautioning that the right to associate is not "absolute." The Court found the State's purpose of eliminating discrimination was a compelling state interest that is unrelated to the suppression of ideas. (*Id.*, at pp. 623-626.) The Court also held that Minnesota's law was the least restrictive means of achieving that interest. The Jaycees had "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." (*Id.*, at p. 626.) Though the Jaycees had "taken public positions on a number of diverse issues, [and] . . .

regularly engage in a variety of . . . activities worthy of constitutional protection under the First Amendment," there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." (*Id.*, at pp. 626-627.) "The Act," the Court held, "requires no change in the Jaycees' creed of promoting the interest of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." (*Id.*, at p. 627.)

The cases above and the discussion of Mr. Tribe's treatise illustrate the concept inherent in applying the freedom of association, that one looks to the purpose of the association in determining whether the freedom is implicated. For instance, the cases above show that organizing for the purpose of political expression, such as the members of the Democratic Party or the Citizens Against Rent Control, entitles the participants to be free of unjustified or discriminatory fettering in their association. So, too, with the Boy Scouts of America. Where, however, the group's pursuit is for other aims, the constitutional protections may be different. The most obvious example, of course, is where the purpose of the association is for criminal gain.

The *Jaycees* case makes two important points. First, the case stands for the general proposition that even constitutional freedoms are not absolute and must themselves be reconciled from time to time to accommodate competing constitutional protections. Second, the case shows that even where a group may take "public positions on a number of diverse issues ... worthy of constitutional protection under the First Amendment," as long as the challenged rule does not "impede the organization's ability to engage in these protected activities..." and the rule serves a compelling interest, the rule may stand.

In examining the extent of the freedom of association with regard to membership communications, one fairly may inquire, then, as to the purpose of the association to determine whether the rule in question to be applied (or withheld) constitutes an impermissible interference with that association. Easier examples are associations described above who have joined for the purpose of pursuing First Amendment protected activity, such as political expression. The more difficult cases, and less present in the case law unfortunately, arise where the association is not organized around pursuit of such activities. For instance, a group of people may belong to a video rental company and may even be labeled "members" by the company. According to the analysis above, one may argue that such an organization is *not* entitled to the presumption of benefiting from the same protections embodied in section 85312, as political associations do, because the *purpose* of the association is a purely *economic* one.

In the video rental company example (or in the case of a grocery store "club card" discount system for "members") three distinctions may be made. First, the membership or group participation of others is irrelevant to the ostensible commercial purpose, except insofar as certain numbers of people are necessary to maintain the enterprise's profitability. This contrasts with the purpose behind expressive or other First

Amendment-oriented groups, for whom there is strength in numbers that enable pursuit of the protected conduct. Second, there exists no First Amendment protected goal or purpose behind the video store or grocery club card organizations - the purpose of these entities is purely profit-motivated, commercial enterprises - the provision of goods and services. While profit motive is not abhorrent to our system - quite the opposite - it is nevertheless not traditionally regarded as First Amendment-protected activity. Moreover, as the *Jaycees* case illustrates, if the membership communications exemption of section 85312 is given a narrow brush by the regulation, so long as the commercial enterprise is able to fully engage in its activities as a *business entity* then no constitutional infirmity likely is present. This is especially true given the purpose behind contribution limits in general, which is to prevent the corruptive influences of campaign contributions and expenditures, a purpose recognized as "sufficiently important" to justify restrictions. (*Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33, 45; *California ProLife Council PAC v. Scully* (1998) 989 F.Supp. 1282, 1294; *North Carolina Right to Life v. Bartlett* (4th Cir. 1999) 168 F.3d 705, 715; *Nixon v. Shrink Missouri Gov't PAC* (2000) 528 U.S. 377, 390.)

Section 85312 shortcuts this issue, in part, by expressly providing that communications to "shareholders" are covered by the exemption. In that case, the constitutional protections of expressive organizations and others is extended, in limited form, to the purely commercial context. The Commission, however, must make other determinations about the breadth of the term "member" and also whether third parties may pay for communications to an organization's members. Therefore, beyond the limited instance of shareholders, the extent of the statute's protections in the context of purely commercial concerns remains an issue for the Commission's determination.

IV. PROPOSED REGULATION 18531.7

Given the number of issues addressed by the proposed regulation, the discussion that follows is broken down by each subdivision in the order presented in the regulation. While some provisions have undergone only slight or no modification from the version last considered by the Commission, some provisions have been deleted entirely or modified substantially. Where appropriate, the discussion will alert the reader to the differences, or lack thereof, between the two drafts and the rationale behind the given approach.

Generally speaking, the regulation embodies the following posture: Subdivision (a), and its respective subsections, define the terms of the statute, such as "organization," "member" and "shareholder." (Reg. 18531.7, subds. (a)(1), (a)(2) and (a)(5), respectively.) Within that framework, the Commission will be asked to determine, among other issues, whether the term "member" will be given a broader or narrower interpretation. (**'Decision 1.'**) In **'Decision 2,'** the Commission is called upon to follow up on its earlier decision to include committees in section 85312 by determining who the members of a committee are.

Subdivisions (b) and (c) of the proposed regulation establish an exemption for small organizations of 25 or fewer members and provide generally for the calculation of payments subject to the statute's purview.

Subdivision (d), the subject of "**Decision 3**," addresses payments by third parties for communications by the organization to its members, or payments to the organization by third parties that are earmarked for the communication.

Subdivision (e), the subject of "**Decision 4**," provides optional language addressing the treatment of communications by an organization to its members that are behested by a candidate.

Remaining subdivisions (f) and (g) codify staff advice and earlier Commission determinations regarding the content of reports for existing committees and the application of the statute to local jurisdictions.

A. Subdivision (a):

With one exception, found in "**Decision 3**," subdivision (a) remains essentially unchanged from the version considered by the Commission in March. Subdivision (a) provides the general rule for payers of member communications and references certain communications that are frequently used to convey support of or opposition to a candidate or ballot measure. Subdivision (a) states that for purposes of § 85312 "payments for communications to members " are any payments:

"... made by {**Decision 3**} [or to] an organization for communications including newsletters, letters, fliers, and other forms of communications to its members, employees, or shareholders, or to the families of its members, employees, or shareholders." (Emphasis added.)

Consistent with the language of § 85312, subdivision (a) also states that a payment for communications does not include any payment made by an organization for general public advertising, such as broadcasting, billboards, and newspaper advertisements, or for communications to any person who is not a member, shareholder, or employee, or family member of such a person.

The text of "**Decision 3**" is conforming language for the decision to be made by the Commission in the context of third party payments, treated in subdivision (d) of the proposed regulation. The discussion of this language will take place below in "Section D" of this memorandum. If the Commission determines third party payments may be made for member communications, the bracketed language must be retained in the final adopted version of the regulation.

1. Subsection (1).

Subdivision (a)(1) identifies persons who make a payment pursuant to section 85312 by providing a definition for "organization" based on the definition of "person" under section 82047. A political party is not included in this definition of organization since section 85312 contains a specific provision requiring reporting of member communications by political parties to members who are registered with the party. The Commission determined earlier that committees are covered by section 85312, and implementing language of that decision is found on lines 14 and 15 of the first page of the draft in subdivision (a)(1). Staff also has included "labor union" on line 13 to make more explicit what the statute already is understood to cover.

2. Subsection (2).

Subdivision (a)(2) contains two versions of language to define the term "member."⁴ The Commission will determine in **Decision 1** whether to apply a broader ("Option 1") or narrower ("Option 2") interpretation of that term.

Option 1 is a simplified version of the definition considered in part by the Commission in March. *Under the structure of this option, a person is a "member" of an organization if either test in (A) or (B) is met.* This language is based in part on Federal Election Commission regulations defining "members." The federal regulations were drafted for the purpose of limiting the persons who can lawfully be solicited for campaign contributions by a membership association, or who can be the recipients of a political communication from a membership association without the communication constituting a campaign expenditure. While section 85312 serves the different purpose of providing an exception to the definitions of "contribution" and "expenditure," the federal regulations defining "members" include criteria that may be useful for purposes of section 85312.

As in earlier drafts of the regulation, **Option 1** requires the organization to have articles, bylaws or other formal organizational documents, pursuant to which the member pays regular dues. Staff has added to lines 19 and 20 language addressing one-time membership payments with "an amount predetermined for membership by the organization." Thus, under the test of (2)(A), once a person pays an organization a membership fee pursuant to the organization's established rules, that person is a "member" under section 85312.

The *alternative* test in subsection (2)(B) addresses those organizations that cannot satisfy the paid dues test of (2)(A). This test establishes membership where a "significant organizational attachment" can be shown, such as through established participatory rights in the governance of the organization.

⁴ The former language of (a)(2), which addressed the issue of when an organization "has members," has been deleted. This language was inspired by federal election law. Its essence has been distilled and its primary purposes found in the amended definition of "member" and amended subdivision (b) of the proposed regulation, discussed below.

"Option 2" borrows the definition of "member" from the California Corporations Code, section 5056. This narrower definition, with no requirement of the payment of dues, requires a "member" to have participatory rights similar to that found in subdivision (2)(B) above in **Option 1**.

Examples: Under **Option 2**, a labor union would still be covered by the statute if, like most unions, the membership elects the union's leaders. Similarly, an organization such as the Sierra Club, which allows each member to vote annually to elect members of the Board of Directors and deciding priority issues, would be within the purview of the statute. A strictly commercial concern, such as Costco, however, would not fall under the exemption of the statute. While shoppers of Costco pay a membership fee that entitles the member to shop at the store, the shoppers are not given participatory rights in the running of the company. The same can be said for a Blockbuster video membership or a grocery store discount card system. This contrasts with **Option 1**, which would bring Costco within the ambit of the statute and perhaps the video and grocery store examples, depending on the particular case.

In comparing the two, the Commission faces the issue of whether the term "member" should be defined narrowly or broadly. Given the Commission's broad definition of "organization" found in subdivision (a)(1) of the regulation, the Commission either can continue the broad reach of the statute or focus the contribution/expenditure exception of section 85312 more narrowly. The test provided in **Option 1** certainly provides greater flexibility to organizations who wish to benefit from the advantages provided by section 85312 and would thereby apply to a greater number of organizations. This is especially true when coupled with the broad definition of "organization." **Option 2**, by contrast, narrows the reach of the statute by defining "member" to require powers akin to shareholders in the commercial context. It may be argued that this definition is more consistent with the requirements of constitutional protections discussed earlier (avoiding overbreadth) while simultaneously using a commercial definition of the term that is consistent with the commercial tone of the other terms, "employees" and "shareholders," used in the statute. The more focused language of **Option 2**, while more restrictive, is thereby arguably easier to apply than **Option 1**. Finally, **Option 2** may be said to be more consistent with the purposes of the Act, generally, by restraining the reach of the exception provided by section 85312, and thereby ensuring meaningful compliance with campaign disclosure and limit provisions.

Staff Recommendation: Staff believes that **Option 2** most closely abides by the Act's purposes of disclosure and contribution limits, and also is consistent with constitutional requirements in this area, **and therefore recommends adoption of version 2**. The decision essentially rests on policy determinations to be made by the Commission. Staff does not believe that either version is an untenable interpretation of the statute.

3. Subsection (a)(3).

This subsection provides an additional definition of "member" in the context of committees. Earlier, the Commission determined that a committee is covered under the definition of "organization." Given the unique nature of a committee, as opposed to a business or other association, the task of defining a "member" is an equally unique challenge. In **Decision 2**, the Commission is asked to decide whether to provide an additional definition of "member" (in addition to the test in subsection (a)(2)) which would apply only to committees.

The proposed language would provide that a "member" of a committee includes any person who has made a contribution to the committee. Bracketed language on lines 12 through 14 provide options that, if included, would limit the definition to those who have made contributions totaling \$100 or more (and who are therefore disclosed in the committee's reports) and would limit the qualifying period to January of the year preceding the year in which the contribution is made (providing a minimum of 12 months and maximum of 24 months). The second sentence, found on lines 14-15, addresses "sponsored committees."⁵ This sentence provides that the members of a sponsored committee or those persons who are "members" of the sponsoring organization (pursuant to (a)(2) and (3)) and have made a contribution to the committee. By way of example, a labor union's members may make monthly contributions to the PAC from their paychecks that, cumulatively, do not reach the \$100 threshold. They would be considered "members" because they belong to the union and make contributions to the PAC.

Staff Recommendation: Staff recommends the adoption of subdivision (a)(3) as a means of addressing the unique status committees hold in relation to other groups. In the event the Commission decides not to adopt this subdivision, staff will apply the rule adopted in subdivision (a)(2), defining "member" generally, to the case of a committee.

4. Subdivision (a)(4).

Subdivision (a)(4) clarifies that the criteria for membership provided in subdivisions (a)(2) and (a)(3) govern in determining whether a person who is on a mailing list or who is a contributor to a committee is a "member." The concern here is to give notice to organizations that mere inclusion in a mailing list or the making of a single

⁵ **"82048.7. Sponsored Committee.**

(a) "Sponsored committee" means a committee, other than a candidate controlled committee, which has one or more sponsors. Any person, except a candidate or other individual, may sponsor a committee.

(b) A person sponsors a committee if any of the following apply:

(1) The committee receives 80 percent or more of its contributions from the person or its members, officers, employees, or shareholders.

(2) The person collects contributions for the committee by use of payroll deductions or dues from its members, officers, or employees.

(3) The person alone or in combination with other organizations, provides all or nearly all of the administrative services for the committee.

(4) The person, alone or in combination with other organizations, sets the policies for soliciting contributions or making expenditures of committee funds."

contribution is insufficient to establish one's status as a member. This concept is carried over from earlier regulation drafts considered by the Commission and is unchanged here.

5. Subdivision (a)(5).

This section defines the term "shareholder." Prior consideration of this issue revealed Commission concerns that previous definitions limited to those who are record holders in the company's books were too narrow. This definition, inspired by the American Bar Association's Model Business Corporations Act, includes record owners of stock *and* beneficial owners of shares. This covers the situation where a person is the beneficial owner of a stock even though a stockbroker, fund manager or other entity is the title-holder of the stock in the records of the corporation.

6. Subdivision (a)(6).

This subdivision defines the term "family." This language augments previous versions by including "domestic partner" as defined by Family Code section 297, as a result of feedback from the public. The regulation's focus is to identify individuals who likely would be part of the member or shareholder's household.

B. Subdivision (b) - Small Membership Organizations Exemption.

Subdivision (b) provides a *de minimis* rule for small membership organizations of 25 or fewer members that do not have a formalized structure meeting the requirements specified in (a)(2). This is unchanged from language previously considered and accepted by the Commission.

C. Subdivision (c) - Calculation of Payments Governed by Section 85312.

Subdivision (c) specifies which costs of a communication count as payments for communications. These include costs directly attributable to the communications such as salaries, production, postage, space or time purchased, agency fees, printing and administrative or overhead costs. Subdivision (b) also sets out a *de minimis* contact rule to prevent inadvertent violations. *This subdivision is unchanged from language already considered and endorsed by the Commission in March.* The language incorporates the Commission's decision not to require record keeping by organizations exempted by the statute and implements on line 16, subdivision (c)(2), the determination that "whichever is higher" shall be used in the context of inadvertent communications.

D. Subdivision (d) - Third Party Payments.

This subdivision represents a simplified form of what the Commission considered in March as subdivision (c)(1) through (c)(3). **Decision 3** provides a subdivision that excludes from the benefit of section 85312 those payments for communications that are paid for by a third party (i.e., not paid for by the "organization" that sends the communication to its "members") and those funds given to an organization by a third

party that are earmarked for the communication. If the Commission elects not to exclude third party payments from the ambit of section 85312, then a conforming change to subdivision (a) adding the words "or to" on line 5 must be made.

Example 1: A civic service organization sends out a newsletter regularly to its members, but it will be sending a special edition to members in which it will run an ad supporting a candidate. A payment of \$20,000 for this special edition is made by an individual to the organization. Under the proposed regulation, this payment does not fall within the membership communication exception of section 85312. Rather, under existing rules found elsewhere in the Act, the individual will have made either an independent expenditure or a contribution to the candidate.

Staff Recommendation: Based on comments at prior Commission and staff meetings, staff believes subdivision (d) provides the best protection against the potential for skirting the contribution limits of section 85301. This will prevent third parties, who otherwise might be subject to contribution limits, from skirting those limits by using the structure of an organization as an intermediary. Accordingly, **staff recommends the Commission adopt subdivision (d) and exclude the bracketed language in subdivision (a).**

E. Subdivision (e) - Payments Behested by Other Candidates or Committees.

Subdivision (e) addresses a slightly different wrinkle from the situation posed by third parties in subdivision (d). Here, the scenario at issue is how to treat payments made by an organization when the communication is made at the behest of a candidate or committee.

Subdivision (e) further addresses the issue of whether the Act's definition of "contribution" provided at section 82015 applies to payments for member communications. Subdivisions (b)(1) and (2) of § 82015 provide that a payment "made at the behest"⁶ of a candidate or committee is a contribution to the requesting candidate or committee. Therefore, ordinarily, when a candidate "behests" a person to make a payment to support that candidate, the payment is a contribution to the candidate. However, if § 85312 provides for an exception to this rule, arguably such a "behested" payment is not a contribution to the candidate. The proposed regulatory language in **Decision 4** allows the Commission to determine whether it considers such coordination to result in a contribution to the candidate or ballot measure committee that asks an organization to send to its members a communication benefiting that candidate or ballot measure. **Option "a"** states a behested payment is a contribution to the candidate, whereas **Option "b"** allows a candidate or committee to behest the payment and still have the payment benefit from the exemption of the statute. **Option "c"** allows the benefit but only when the communication is created by the membership organization.

⁶ "Made at the behest of" means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code section 82031." (Reg. 18225.7.)

The following examples illustrate how the proposed regulation including subdivision (e) would operate if a "behested" payment *is* determined to be a contribution to the person requesting the payment:

Example: A chapter of a non-profit (501(c)(4)) entity is using its own general fund money (the entity has no PAC) to send out postcards supporting a ballot measure. The postcards will go only to the entity's dues-paying members. The mailing is done at the behest of the ballot measure committee formed to support the measure. Under the proposed regulation, **Option "a"**, payments made by the non-profit entity for these communications are contributions to the ballot measure committee. Under **Option "b,"** the payment would be entitled to the exemption provided by section 85312, and the non-profit would not be making a contribution to the ballot measure committee. Under **Option "c,"** the non-profit would only be considered to have made a contribution to the ballot measure committee (and therefore unable to benefit from the exception of section 85312) if the communication delivered to its members was created by someone other than the non-profit itself (e.g., if the non-profit was distributing a communication created by the ballot measure committee itself).

Staff Recommendation: Staff makes no recommendation on this issue, but notes that if such payments are not contributions to the "behesting" candidate or ballot measure committee, the contribution and expenditure limits may be evaded. The Commission may wish to defer action on this issue until September when the Commission considers the definition of contributions "made at the behest of a candidate" in regulation 18225.7. On the other hand, should the Commission want desire guidance for the November general election, the Commission might consider the optional language in **Decision 4, Option (c)** that would allow the communication so long as the message itself was created by the organization without input from the behesting candidate or committee.

F. Subdivision (f) - Reporting.

This subdivision does not alter previous language considered and endorsed by the Commission. Furthermore, this subdivision codifies advice given by staff in the Zakson Advice Letter, A-01-195. (Exhibit 2.) Subdivision (f) implements the Commission's determination to include committees within the scope of section 85312's exception. Subdivision (f) states:

"If the organization is a committee organized under Government Code section 82103, subdivision (a) and therefore already subject to the reporting requirements of Chapter 4 of this title, the payment is reportable in accordance with the requirements of Government Code section 84211, subdivisions (b), (i), (j) and (k)."

While not requiring a recipient committee to report member communications as contributions or independent expenditures, this proposed subdivision would require these payments to be reported as payments "made" by the committee to specific candidates or

measures and to report total costs associated with the communications. This means that reporting committees would remain the same as pre-Proposition 34. If the Commission wishes only total costs associated with communications to be reportable, the regulation should reference subdivision (b), (i), (j) and (k)(1)-(4), and exclude (k)(5).

G. Subdivision (g) - Applicability to Local Candidates and Measures.

This subdivision, present in early drafts of the regulation but later deleted, has been reinserted to emphasize the scope of the statute's applicability.

Attachments:

Exhibit 1: Proposed Regulation 18531.7.

Exhibit 2: *Zakson* Advice Letter, A-01-195.